International Union of Bricklayers and Allied Craftworkers, AFL–CIO *and* Bridge, Structural and Reinforcing Iron Workers, Local Union No. 1 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO *and* Cretex Construction Services, Inc. Case 13–CD–720

December 16, 2004

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The charge in this Section 10(k) proceeding was filed on August 25, 2004, by Cretex Construction Services, Inc. (Cretex). It alleges that the Respondent, International Union of Bricklayers and Allied Craftworkers, AFL-CIO (the Bricklayers) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Cretex to assign certain work to employees represented by the Bricklayers rather than to employees represented by the Bridge, Structural and Reinforcing Iron Workers, Local Union No. 1 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO (the Iron Workers). A hearing was held on September 15 and 23, 2004, before Hearing Officer Lisa Friedheim-Weis. Thereafter, Cretex, the Bricklayers, and the Iron Workers filed briefs in support of their positions. The Iron Workers also filed a motion to quash the Section 10(k) notice of hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer is an Illinois corporation engaged in the business of erecting precast concrete and that it annually ships goods valued in excess of $50,000 from its facility in Rochelle, Illinois, to customers located outside the State of Illinois. Accordingly, on the basis of the parties' stipulations, we find that Cretex is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that the Bricklayers and the Iron Workers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts

The current dispute involves precast concrete erection work at Midway Airport in Chicago, Illinois.

Cretex is a construction company that performs precast concrete erection projects in the Chicago area. It recognizes the Bricklayers as the exclusive bargaining representative of its field employees under Section 9(a) of the Act. It is party to a collective-bargaining agreement with the Bricklayers providing that employees represented by the Bricklayers shall perform all its precast concrete erection work, and its practice is to employ only employees represented by the Bricklayers for this purpose.

In January 2004, Cretex submitted a bid to a general contractor, F. H. Paschen/S. N. Nielsen, Inc. (Paschen), to perform the precast concrete erection work for a parking deck at Chicago's Midway Airport (the Midway Project). In January or February of that year, Paul Heiman, Cretex's vice president, was informed orally that Cretex had been awarded the subcontract.

In late 2003 and early 2004, Iron Workers Local 1 was attempting to organize several of the precast concrete erection contractors in the Chicago area. On March 25,[1] Iron Workers representative, Danny Caliendo, met with Cretex employees working on another Cretex project. In the course of his conversation with them regarding the organizing drive, he stated that Cretex had been awarded the Midway Project, that the Iron Workers traditionally perform this type of work, and that the Iron Workers would take whatever actions were necessary to get the work back.

On April 12, the City of Chicago executed a contract with Paschen for the Midway Project, which named Cretex as the subcontractor for the precast concrete erection work. On August 9, Paschen sent Cretex a letter of intent to award it the precast concrete erection work, and on August 11 Cretex sent a letter of assignment to the Bricklayers giving notice that its Bricklayers-represented employees would perform Cretex's work on the Project.

On August 23, Heiman spoke on the telephone with Bricklayers business agent, Don Newton, about the Midway Project. Newton said he had heard rumors that the Iron Workers were going to claim the precast concrete work and reminded Heiman that Cretex was obliged to assign the work to Bricklayers-represented employees under the collective-bargaining agreement. Heiman acknowledged hearing similar rumors and said that he intended to assign the work to employees represented by the Bricklayers, but that he did not know what he would do if the Iron Workers claimed the work. Heiman also

[1] All dates are in 2004.

Heiman also stated that he had heard from a Paschen representative that the Iron Workers had been asking who would be erecting the precast concrete on the Midway Project and that the Paschen representative was concerned about potential labor issues. Around this time, Heiman contacted Bricklayers regional director, Thomas McClanahan, informed him of these same concerns, and sought assurance that "we're going to be represented well with the Bricklayers." On August 24, Heiman received a letter from McClanahan stating that the Bricklayers were "fully prepared to picket . . . and apply other appropriate means of lawful pressure on all effective parties to this project" if Bricklayers-represented employees were replaced with employees represented by the Iron Workers. On August 25, Cretex filed the instant charge.

On August 31, the Iron Workers requested a hearing to determine jurisdiction over the Midway Project before the Joint Conference Board (JCB) established under the standard agreement between the Cook County Building Trades Council and the Construction Employers Association. The JCB arbitrator dismissed the case on September 22 on the ground that the JCB had no jurisdiction over Cretex because Cretex was not bound by the standard agreement.

Meanwhile, over the course of August and September, Paschen and Cretex settled the details of their subcontracting agreement. Paschen confirmed its intent to award Cretex the subcontract by a letter dated September 14, and the parties executed the final subcontract on September 21. In this final contract, the parties deleted the clause of Paschen's standard subcontracting agreement that required the submission of work jurisdiction disputes to the JCB.

B. Work in Dispute

The notice of hearing states, and Cretex and the Bricklayers stipulate, that the work in dispute is "the precast concrete erection work for an elevated parking structure and dedicated busway route at Midway Airport in Chicago, Illinois." The Iron Workers characterize the work in question as "structural" precast concrete erection. Since this distinction does not vary the nature or scope of the work in dispute, we find that the work in dispute is as set forth in the notice of hearing.

C. Contentions of the Parties

The Iron Workers moves to quash the notice of hearing, arguing that there is no reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated. It argues that there are no competing claims to the work because Caliendo's March 25 remarks had an organizational object and were made before Cretex had the authority to assign the disputed work, and that the JCB filing was an attempt to settle the dispute rather than a claim to the work. It further contends that the threat made by the Bricklayers in its letter to Heiman was a sham intended only as a maneuver to bring this dispute before the Board. On the merits, the Iron Workers argues that the work should be awarded to employees it represents on the basis of relative skills and safety, area and industry practice, and a 1962 agreement between the Iron Workers and Bricklayers international unions assigning structural precast concrete work to employees represented by the Iron Workers.

Cretex asserts that this dispute is properly before the Board. It contends that the Iron Workers claimed the work through its JCB filing and Caliendo's remarks regarding the Midway Project on March 25, and that the Bricklayers' letter to Heiman provides reasonable cause to believe that the Bricklayers violated Section 8(b)(4)(D) of the Act. It further asserts that the work should be awarded to employees represented by the Bricklayers on the basis of Cretex's collective-bargaining agreement with the Bricklayers, employer preference, relative skills, economy and efficiency of operations, and industry and area practice. Cretex also contends that the Board should issue a broad order awarding all Cretex's precast concrete erection work in the Chicago area to employees represented by the Bricklayers.

The Bricklayers contends that that the statute is applicable because competing claims exist and there is reasonable cause to believe that the Bricklayers violated Section 8(b)(4)(D) of the Act. The Bricklayers also argues that the work should be assigned to employees represented by the Bricklayers on the basis of collective-bargaining agreements, employer preference and practice, industry and area practice, relative skills and training, economy and efficiency of operations, loss of existing jobs, and prior Board awards.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires a finding that there is reasonable cause to believe that there are competing claims to disputed work between rival groups of employees and that a party has used proscribed means to enforce its claim.[2]

Although the Iron Workers denies that it claimed the work in dispute, we find that there is reasonable cause to

[2] In addition, the Board must find that no method for voluntary adjustment of the dispute has been agreed upon. None of the parties contends that such a method presently exists.

believe that there are competing claims. As discussed above, on March 25 Iron Workers business agent, Caliendo, made remarks to Cretex employees that on their face constituted a claim to the Midway Project precast concrete erection work. The Iron Workers cite testimony that during the same meeting, Caliendo also engaged in discussions and activities related to the Iron Workers' drive to organize precast concrete erection contractors in the Chicago area. The possibility that acts or statements that constitute a claim to work may also have an organizational object outside the scope of Section 8(b)(4)(D) is, however, insufficient to prevent a finding of reasonable cause.[3]

We also reject the Iron Workers' contention that Caliendo's remarks regarding the Midway Project cannot constitute a claim for work because, at the time they were made, Cretex had only received oral notification that it had been awarded the subcontract and so did not possess the authority to assign the Midway Project to its employees. By the time the case reached the Board, Cretex and Paschen had executed a formal contract for the precast work on the Midway Project, dispelling any uncertainty about Cretex's authority to assign the work and rendering the dispute ripe for our determination.[4]

We find also that there is reasonable cause to believe that the Bricklayers used means proscribed under Section 8(b)(4)(D) when, in its letter to Heiman, it threatened to picket Cretex if the Midway Project work were reassigned. The Iron Workers urges the Board to find that this threat was a sham because it was made immediately after discussions between Cretex and Bricklayers representatives, the letter's wording mirrored that of an earlier letter sent by the Bricklayers after the Iron Workers claimed another precast project involving Cretex, the Bricklayers took no steps to invoke its rights under its collective-bargaining agreement with Cretex, and realization of the threat would have violated the no-strike clause of the agreement. The Iron Workers does not, however, offer any direct evidence to show that the Bricklayers did not intend its threat seriously. In the absence of such evidence, it is well settled that where a charged party has used language that on its face threatens economic action, the Board will find reasonable cause to believe that Section 8(b)(4)(D) has been violated.[5]

We therefore find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. Accordingly, we find that the dispute is properly before the Board for determination, and we deny the Iron Workers' motion to quash the notice of hearing.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute.

As noted above, Cretex has a collective-bargaining agreement with the Bricklayers that encompasses precast concrete erection work. The agreement provides that Bricklayers are to perform "the erection, installation and remedial work concerning all precast, prestressed and prefabricated concrete building systems." The Employer is not, and has never been, a signatory to an Iron Workers' collective-bargaining agreement. Accordingly, we

[3] Cf. *Longshoremen ILA (Reserve Marine Terminals)*, 317 NLRB 848, 850 (1995) (finding charged union's conduct within ambit of Sec. 8(b)(4)(D) where that conduct had "an area standards purpose" as well as a proscribed jurisdictional object). Our finding that there is reasonable cause to believe that Caliendo's statements constituted a claim for work is further supported by the fact that the Iron Workers later filed a claim for the work with the Joint Conference Board. See, e.g., *Bricklayers (W. R. Weis Co.)*, 336 NLRB 699, 700 (2001).

[4] The Iron Workers' reliance on *Sheet Metal Workers Local 28 (Hausman Engineering)*, 316 NLRB 1149 (1995), is misplaced. In *Hausman Engineering*, the Board found that no competing claims existed, although four subcontractors had bid on the work at issue and the union representing three of the subcontractors' employees had claimed the work, because none of the bids had been accepted, and the general contractor had indicated its intent to perform the work in-house with employees represented by unions who were not parties to the proceeding. Id. at 1150. Also distinguishable is *Printing & Paper Trades Workers 520 (Cuneo Eastern Press)*, 168 NLRB 531, 532 (1967), where the Board declined to determine possible disputes over future work assignments. Here, as stated above, a general contractor has formally awarded disputed work to a subcontractor, and the subcontractor has made a specific assignment of that work to a defined group of employees.

[5] See *Teamsters Local 6 (Anheuser-Busch)*, 270 NLRB 219, 220 (1984) (rejecting contention that a threat was a sham because its realization would have involved violating a no-strike clause in the collective-bargaining agreement between the employer and the charged union); *Lancaster Typographical Union No. 70*, 325 NLRB 449, 450-451 (1998) (rejecting argument that the timing of a picketing threat showed that the threat was a sham). Compare *Iron Workers Local 433 (Crescent Corp.)*, 277 NLRB 670, 673 fn. 6 (1985) (finding that union attorney's threat to take job action did not constitute reasonable cause to believe Sec. 8(b)(4)(D) had been violated where the employer testified that the attorney said "[y]ou can have your magic words" before delivering the threat).

find that the factor of collective-bargaining agreements favors an award of the work in dispute to employees represented by the Bricklayers.

2. Employer preference and past practice

Cretex prefers to assign the work to employees represented by the Bricklayers. Cretex's consistent past practice has been to assign all precast erection work exclusively to the Bricklayers. Therefore, we find that these factors favor awarding the disputed work to employees represented by the Bricklayers.

3. Area and industry practice

Both the Bricklayers and the Iron Workers offered evidence that employees represented by their respective unions have performed the disputed work nationally and at sites within the Chicago area. Thus, we find that this factor does not favor awarding the disputed work to employees represented by either union.

4. Relative skill and experience

Both the Bricklayers and the Iron Workers offered evidence that employees represented by their respective unions were qualified to do the work. Accordingly, we find that this factor does not favor awarding the disputed work to either group of employees.

5. Economy and efficiency of operations

The Bricklayers offered evidence that, because the employees it represents are able to perform the grouting and caulking tasks involved in precast concrete erection, they are able to continue to work even when equipment failure interrupts the erection of panels. Cretex Vice President Heiman testified that, based on his personal observation of Iron Workers crews, employees represented by the Iron Workers do not perform grouting and caulking and are therefore unable to work in the event of equipment failure. The Iron Workers do not dispute Heiman's testimony in this regard. Accordingly, we find that this factor favors awarding the disputed work to employees represented by the Bricklayers.

6. Interunion areements

The Iron Workers offered evidence of a 1962 agreement between the Iron Workers and Bricklayers international unions assigning structural precast concrete erection work to employees represented by the Iron Workers. However, the Bricklayers offered uncontradicted evidence that the Bricklayers international repudiated the application of the 1962 agreement in the Chicago area in 1967, and that the 1962 agreement has not been followed in that area. Accordingly, we find that this factor does not favor awarding the disputed work to either group of employees.

CONCLUSION

After considering all of the relevant factors, we conclude that employees represented by International Union of Bricklayers and Allied Craftworkers, AFL–CIO, are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference, employer past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by the Bricklayers, not to that Union or its members.

Scope of the Award

The Employer contends that the Board should issue a broad order with respect to the disputed work because disputes between the Iron Workers and Bricklayers concerning the erection and installation of precast concrete have been prevalent in the Chicago area and are likely to reoccur.

The Board customarily declines to grant an areawide award in cases in which the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See, e.g., *Plumbers Local 562 (Charles E. Jarrell)*, 329 NLRB 529 (1999). Accordingly, we shall limit the present determination to the work jurisdiction dispute that gave rise to these proceedings.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Cretex Construction Services, Inc., represented by International Union of Bricklayers and Allied Craftworkers, AFL–CIO, are entitled to perform the precast concrete erection work for an elevated parking structure and dedicated busway route at Midway Airport in Chicago, Illinois on behalf of Cretex Construction Services, Inc.

Dated, Washington, D.C. December 16, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD